SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

GUERNEY O. BURTCH, RESPONDENT.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

GUERNEY O. BURTCH, RESPONDENT.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

I.

Preliminary Statement.

This brief is intended to be supplemental to the brief that was filed at the time the petition was filed.

II.

Points and Authorities.

1. Respondent was engaged in interstate commerce at the time of his injury.

N. Y. C. and H. R. R. Co. *v.* Carr, 238 U. S., 260.
Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

2. The handling of interstate shipments by a carrier and the relations between such carrier and employees in connection with such a shipment are governed by the Federal law.

Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

3. The tariffs of a carrier filed with the Interstate Commerce Commission have the same force and effect as a statute.

Keogh *v.* Chicago & Northwestern Railway Company *et al.*, — U. S., —; s. c., 43 Supreme Court Reporter, 47.

4. Tariffs of a carrier filed with the Interstate Commerce Commission cannot be changed or modified by the carrier or shipper.

Keogh *v.* Chicago & Northwestern Railway Company *et al.*, — U. S., —; s. c., 43 Supreme Court Reporter, 47.

III.

Argument.

a. The Jurisdiction of This Court.

When all the evidence in the record is considered on the question of the character of the shipment, we submit that there can be no doubt of the shipment being interstate. The answers to the interrogatories alone do not control, for all the evidence on the point must be considered. Not only did

the witness Lurton say (Record, page 59) that the cutter was shipped from a warehouse in Louisville, but he also said (Record, page 60) that the bill of lading was made out to him from Louisville to Commiskey.

Then the witness Hartwell (Record, page 41) said that the train involved came from Louisville, and that this cutter was in one of the cars on that train that came from Louisville.

Moreover, this is all the evidence on the point, and it is not contradicted in any way.

We submit that this evidence establishes not only that the train but that the car and the shipment as well came from Louisville at the same time, and that therefore the shipment was interstate.

But, even if we assume for the present that the shipment was being moved wholly between points in the State of Indiana in an interstate train, nevertheless the case is controlled by the Federal law. We contend that under the facts in this case the decision in New York Central and Hudson River Railroad Company *v.* Carr, 238 U. S., 260, is controlling. There the plaintiff, a brakeman, was injured while cutting off the engine after delivering on a side track two cars moving wholly between points in the State preparatory to the engine returning to the rest of the train that had cars coming from without the State. We believe that there can be no vital distinction here between a car and a single shipment.

Moreover, a train containing both State and interstate shipments is an interstate train.

Philadelphia & Reading Railway Company *v.* Polk, 256 U. S., 332.

b. Burtch was One of the Owners of the Shipment.

Here again we must not stop at the interrogatories, but must consider the whole record. The answer to the first interrogatory (Record, page 16) is not controlling. The witness Lurton, through whom the shipment was purchased, said (Record, page 60) that Burtch was one of a company of farmers to whom it had been sold.

Moreover, in the petition (Record, page 4) it is alleged "that plaintiff and six of his neighbors had bought said machine, and he was present upon the arrival of said train to receive said machine, and had arranged to use the same upon his farm the following day."

Rule 8-*b* of the classification, which is a tariff, does not name the consignee (Record, page 92), but puts the obligation upon the owners of shipments to load and unload if the shipments are too heavy for the carrier's loading and unloading facilities.

c. The Instructions of the Trial Court.

Assuming, for the purposes of the argument, that the instructions requested by the railroad company are not artistically drawn, nevertheless the failure of the trial court to give any instruction based on the interstate phase of the case establishes error. The objection made to these instructions was not that the law was wrong as applied to an interstate case, but that there was no interstate case. See in this connection the opinion of the State Supreme Court (Record, pages 107, 108, 109).

Moreover, the court not only did not give any instructions

based on the interstate character of the shipment, but submitted the case on the theory that the State law controlled. See here, particularly, instruction No. three (3) (Record, page 25). This instruction is based squarely on section three (3) of the State Liability Law. This statute is printed in full as an appendix to our brief filed with the petition.

Our proposed instruction No. eight (8) (Record, page 28), which was refused, was based on the interstate character of the shipment. As the duty rested on Burtch, under Rule 8-*b*, to unload, his act in selecting the timbers preparatory to unloading was his individual act, for which he was responsible.

The second paragraph of the complaint is based upon Burtch being at the station to receive the shipment. This is supported by the evidence. See the testimony of the witness Moppin (Record, page 62) and of the witness Arbuckle (Record, page 70). He was an owner and as such was obligated to unload. This duty could not be waived as assumed by instruction number 5½. In Keogh *v.* Chicago & Northwestern Railway Company, 43 Supreme Court Reporter, 47, this Court said:

> "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

Conclusion.

It must be borne in mind that the Supreme Court of the State (Record, page 98) affirmed the position taken by the trial court on all points, especially the one as to the State character of the shipment (Record, pages 107, 108). It is our contention that the case should have been tried on the

theory that the shipment was interstate, and that the Federal law applied, and for that reason that the State court should be reversed.

Respectfully submitted,

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

No. 115

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES

The Baltimore and Ohio Southwestern Railroad Company, Petitioner.

vs.

Guerney O. Burtch, Respondent.

Petition and Brief for Writ of Certiorari to the Supreme Court of the State of Indiana.

Morison R. Waite,
Harry R. McMullen,
Cassius W. McMullen,
William A. Eggers,

Attorneys for Petitioner.

No. 577.

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, Petitioner, vs. GUERNEY O. BURTCH, Respondent.	PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of The Supreme Court of the United States:

Your Petitioner, The Baltimore and Ohio Southwestern Railroad Company, respectfully shows as follows:

Guerney O. Burtch, in an action brought in the Circuit Court of Jackson County, State of Indiana, sought to recover damages against The Baltimore and Ohio Southwestern Railroad Company for personal injuries received in unloading a shipment of freight. The trial resulted in a verdict for the plaintiff below and judgment for Eight Thousand

($8,000.00) Dollars. Upon the pleadings and the bill of exceptions duly set out the case was taken to the Supreme Court of the State of Indiana, which affirmed the judgment March 14, 1922, (134 Northeastern Reporter 858). A petition for rehearing was denied by the Supreme Court of the State, June 8th, 1922, this being the final step available to your Petitioner in the State Courts.

The shipment involved originated at Louisville, Ky., and was destined to Comiskey, Ind. It consisted of an ensilage cutter that weighed about two thousand (2,000) pounds. While it was ordered through a local dealer at Comiskey from a wholesale house at Indianapolis, the plaintiff and others were the owners and were on hand upon the arrival of the train on the day of the accident, prepared to receive it. The crew of the local freight train handling the shipment found that it was too heavy to unload alone and with an ordinary skid. The train went upon a side track to allow a passenger train by and while standing there the conductor called upon the bystanders to assist in the unloading and requested that planks be brought for that purpose. The plaintiff and another bystander who also was a part owner in the machine responded, went to a nearby saw mill and selected two planks, not the property of the Railroad Company, which were placed against the car door by plaintiff and the other owner, ready for unloading. One of these planks broke when cutter was about two-thirds of the way from car to ground injuring plaintiff.

The first paragraph of the petition is based upon the Indiana Employers' Liability Act, (Acts 1911, page 145, Sections 8020-a, et seq. Burns' 1914) on the theory that the plaintiff became an employe of the Railroad Company by acting on the request of the conductor that he assist in unloading, and on the theory that the Railroad Company not having complied with the provisions of the law was, therefore, deprived of the common law defenses. The negligence alleged was the failure to place the car in a proper position for unloading, the failure to have a sufficient number of men on hand to unload the shipment, and the failure to have proper appliances for that purpose and the furnishing of a defective skid without making a proper examination thereof.

The second paragraph of the petition alleged the same ground of negligence, but is based upon the common law rather than statutes.

The trial court adopted the theories of the complaint and, among others, the court gave to the jury the following instructions:

> "No. 1. If you find that upon arrival of defendant's local freight train at the station of Comiskey, Indiana, on October 24th, 1917, carrying the ensilage cutter, as alleged in the complaint herein, such machine was so heavy as to make it unsafe for the regular crew upon said train and at said station in defendant's employ at the time, to attempt to unload the same and that an emer-

gency existed authorizing the conductor to call to his aid additional assistance, and if in these circumstances the conductor in charge of said train acting in line of his duty and on behalf of defendant requested bystanders, including plaintiff Guerney O. Burtch to assist in unloading said machine and in response to said request plaintiff did undertake to assist in said work, then defendant owed to plaintiff while so engaged the same duty of care that it owed to a laborer regularly in its employ while engaged in the same or similar work, and plaintiff was while so working an employee of defendant's although not expecting compensation."

"No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at that time defendant was engaged in operating a railroad in this state and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was injured while under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said conductor and caused by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries, and your verdict should be for the plaintiff."

"No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at that time defendant had in its employ and engaged in conducting its said business in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exercise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

The Railroad Company requested that instructions be given the jury on the theory that the case was controlled by the Federal Employers' Liability Ast (Act April 22, 1908, 35 Stat. 65, Secs. 8657, et seq. U. S. Comp. Stat.) because the shipment at the time of the accident was an interstate shipment, and that if the relationship of master and servant existed between the plaintiff and the Railroad Company, the obligation of the Railroad Company was controlled by the Federal law.

The instructions requested on this point, but which were refused are as follows:

"No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky to Comiskey and other points in Indiana I charge you that this was an interstate shipment and said trains and employees were engaged in interstate com-

merce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk."

"No. 8. If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured he cannot recover and your verdict must be for defendant."

The Railroad Company likewise set up that the duties as to unloading were governed by rule 8-b of the Official Classification at that time filed both with the Public Service Commission of Indiana and with the Interstate Commerce Commission as a tariff, the rule in question reading:

"Owners are required to load and unload heavy or bulky freight carried at L.C.L. ratings that cannot be handled by

> the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling."

The trial court permitted evidence to be introduced over the objection of the Railroad Company showing that the Railroad Company customarily disregarded this rule. On that point it gave an instruction as requested by the plaintiff, and which read:

> "No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a traffic rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an actionable injury sustained by one of its employees merely because of such rule."

It refused to give the following instruction on this point, requested by defendant:

> "No. 11. A published rate, rule or regulation so long as it is in force, has the effect of a statute and is binding alike on shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect."

The Supreme Court of the State affirmed the judgment on all points. This action of the State courts thus denied to your petitioners rights ac-

corded it under the Federal Employers' Liability Act and the Interstate Commerce Act.

Your Petitioner insists that the case should have been submitted to the jury on the theory that the shipment was an interstate shipment and that its interstate character had not terminated at the time of the accident, and that if the relationship of master and servant existed, that relationship was controlled by the Federal law, and that the instructions given by the Court based on the State Statute, which denied the defendant the defenses of assumption of risk and contributory negligence, were erroneously given, and those as to the applicability of the Federal Statute should have been given. Further, because under the tariffs, it was the duty of the plaintiff to have unloaded the shipment and to have furnished appliances for that purpose, therefore, there was no obligation of any sort resting upon the Railroad Company, either to furnish a proper number of men or proper appliances for the purpose of unloading the shipment and the relationship of master and servant did not exist. On either theory the defenses of assumption of risk and contributory negligence were available to the Railroad Company, and the jury should have been instructed accordingly.

Your Petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the State Court and will present its brief for consideration with this petition discussing at greater length the questions involved.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of Indiana, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of proceedings in said Supreme Court in the case therein entitled: "The Baltimore and Ohio Southwestern Railroad Company, Appellant, vs. Guerney O. Burtch, Appellee," and numbered in said Supreme Court, 25,536, to the end that such case may be reviewed and determined by this Court as provided in the acts of Congress in such case made and provided and that the Petitioner may have such relief as this Court may deem proper and that the opinion and judgment of the said Supreme Court of the State of Indiana and said Jackson Circuit Court be reversed by this Honorable Court.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,

HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
MORISON R. WAITE,

Its Attorneys.

State of Ohio, County of Hamilton, SS.

MORISON R. WAITE, being duly sworn on his oath says, that he is one of the counsel for the Baltimore and Ohio Southwestern Railroad Company, Petitioner herein; that the foregoing petition was prepared under his instruction and under his supervision and that he has carefully read the same and believes the allegations therein are true.

MORISON R. WAITE.

Subscribed and sworn to before me this 30th day of August, 1922.

PAUL DEWALD,
Notary Public.
Hamilton County, Ohio.

My commission expires March 25, 1924.

No. 577.

October Term, 1922.

THE SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,

vs.

GUERNEY O. BURTCH,
Respondent.

Petitioner's Brief on Petition for Writ of Certiorari to the Supreme Court of the State of Indiana.

MORISON R. WAITE,
HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
Attorneys for Petitioner.

INDEX

I

II

III

IV

TABLE OF CASES.

No. 577.

October Term, 1922.

SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,
vs.
GUERNEY O. BURTCH,
Respondent.

Brief on Behalf of Petitioner,

I

Statement of Facts and Pleadings.

This case originated in the Jackson Circuit Court, Jackson County, Indiana, and was there tried resulting in a verdict and judgment against your Petitioner for $8,000. An appeal to the Supreme Court of Indiana was taken and the judgment was affirmed. A petition for rehearing was filed and heard and on June 8, 1922, the same was denied.

The respondent, with others, had purchased an ensilage cutter to be used by them on their several farms. While respondent was at the station of Comiskey, Indiana, with those (several other men) interested in the cutter, a local freight train, which

had carried the cutter from Louisville, Kentucky, to said station of Comiskey, Indiana, arrived, going upon a side track to allow a passenger train to pass and not upon the station track where cars are unloaded.

The conductor of the train asked the crowd what they were there for and was informed for the ensilage cutter. Whereupon the conductor told them come on back and help unload. Some of these men, including respondent, went to help. The conductor directed the men to get some heavy timbers and respondent and another, likewise interested in the machine, went to a nearby saw mill and got two timbers and put them against the car. When the cutter was about two-thirds of the way from the car to ground, one timber broke, the cutter fell on respondent and injured him.

a—The Complaint.

The respondent's complaint was in two paragraphs, the first of which alleges that it was the duty of the conductor to unload the cutter as it was very heavy; that petitioner had employed only three brakemen who were unable to unload the cutter; that an emergency thereby arose and thereupon the conductor requested respondent to assist; that the petitioner should have provided safe skids but did not and that conductor caused two green and defective planks to be brought and failed to inspect the same and one of them broke allowing the cutter to fall upon and injure respondent.

The second paragraph alleges that respondent and six of his neighbors had bought the ensilage cutter and that respondent was to use the same on the following day; that respondent was present at the station upon the arrival of the train bearing the cutter; that it was the duty of the conductor to unload the cutter as it was heavy, weighing 2,000 pounds; that only three brakemen were employed by the petitioner and were unable to unload the cutter; that petitioner did not provide safe skids and that the conductor caused two green planks to be brought which were defective and conductor failed to inspect the same; that because of respondent's interest in the cutter and with the knowledge and at the request of the conductor he assisted in the unloading of the cutter and while doing so the plank broke and he was injured. (Pt. Rec., p. 2 et seq.)

The complaint failed to allege the interstate character of the shipment and petitioner at its first opportunity, as allowed by the local practice, endeavored by a motion to make more specific to have this shown but the motion was overruled, exception taken and the question presented to the Supreme Court of Indiana, which ruled that the facts sought in the motion were as well known to petitioner as respondent and sustained the ruling of the Jackson Circuit Court. (Pt. Rec., pp. 8-99.)

Your petitioner again presented the question as to the interstate character of the shipment by demurrer to each paragraph of complaint. (Pt. Rec., pp. 9, 10.)

The lower court overruled the demurrer and the Indiana Supreme Court upheld said ruling, holding that the conductor had authority to employ respondent and that petitioner was answerable to respondent thereby for any damages he might receive by reason of negligence of conductor in adopting the means to do the work at hand.

The opinion of the Supreme Court of Indiana will be found in Pt. Rec., p. 98.

The petitioner herein also filed an answer in the Jackson Circuit Court, setting up the facts that the shipment complained of was an interstate shipment and that respondent assumed the risks of his service and also alleged that under Sec. 2 of Rule 8-b it was the duty of respondent or consignee and not the duty of the petitioner to unload freight of the character mentioned in the complaint. (Pt. Rec., p. 12.)

To this a demurrer was filed by respondent and the same was sustained over the exception of petitioner and the question was presented to said Supreme Court of Indiana but was never passed upon by said Court last named.

b—Instructions.

The respondent requested the court below to give to the jury ertain instructions which the trial court gave over the objection and exception of your petitioner and among such given was the following, viz.:

"No. 3. If you find that the plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at that time defendant had in its employ and engaged in conducting its business in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exrecise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

Exception to the above instruction was properly taken and the question was presented to the State Supreme Court which held that as the first paragraph of complaint was based upon the local (state) Employers' Liability statute,* that it would have been error for the lower court not to have given the instruction. (Pt. Rec., p. 26.)

Instruction No. 5½, given by the trial court at the request of plaintiff, reads as follows, viz.:

"No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a tariff rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through a series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an action-

*NOTE—This statute is carried in full as an appendix to this brief.

able injury sustained by one of its employees merely because of such rule." (Pt. Rec., p. 26.)

Exception was duly taken to the giving of this instruction.

The petitioner duly presented certain instructions to the trial court and requested that they be given to the jury. (Pt. Rec., p. 27.)

Among those requested was the following, viz.:

> "No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Comiskey, and other points in Indiana, I charge you that this was an interstate shipment and said train and employees were engaged in interstate commerce and the relations of employees and defendant were governed by the Federal law and not the law of the State of Indiana. I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover, as he must be held to have assumed the risk."

This instruction was refused, exception taken and the question duly presented to the Supreme Court of Indiana, which held that one called specially to assist in unloading a shipment at the point of destination was not engaged in interstate com-

merce although the shipment may have been interstate in character. (Pt. Rec., pp. 29-107.)

Instruction No. 8 requested by petitioner is as follows, viz.:

> "No. 8. If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for the defendant."

This instruction was likewise presented to said last named court and for the same reasons as given in upholding No. 7 this was upheld, the said court simply stating that it was not error to refuse No. 8 and that the case was not one within the Federal Act.

Instruction No. 11 was presented by petitioner to the trial court and refused and duly presented to the Supreme Court and reads as follows, viz.:

> "No. 11. A published rate, rule or regulation, so long as it is in force, has the effect of a statute and is binding alike on

> shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect." (Pt. Rec., p. 28.)

The Supreme Court sustained the trial court in refusing this instruction for the same reasons that it gave in connection with Instructions Nos. 7 and 8 proposed by the railroad company.

c.—The Testimony

Among several other witnesses was one Charles F. Lurton who testified as to the practice of the Petitioners' conductors and train crews calling for assistance in unloading heavy shipments.

Witness Lurton was asked the following question:

> Q. From your knowledge what was the practice while you were agent, of the defendant and its freight conductors in the way of calling for assistance in unloading heavy articles of freight destined to that point.

The Petitioner objected to the above question for the reasons that an emergency is alleged; that it is improper to prove a practice that is contrary to law; improper to prove authority of conductor by custom and no custom is alleged in the complaint, it is prejudicial and the knowledge of witness is too remote. (Acquaintance of witness ceased five years prior to accident.) (Pt. Rec., p. 58.)

The objection was overruled, exception taken and the witness was permitted to answer:

> A. It is a very common occurrence for a train crew to ask some one to help with heavy freight.

The Petitioner moved to strike out the answer for the reasons above given and that the answer was not responsive to the question.

Motion overruled and exception (Ptd. Rec. p. 59.)

There were several other witnesses to the same effect but we present but the one.

O. P. Gothlin was called as a witness by Respondent and was asked the following question.

> Q. You may state what in your experience and knowledge has been the practice of carriers with reference to the disposition of cars or bulky shipments on their arrival at the point of destination, that purports to come under this rule known as 8-b what was the practice in Indiana in October 1917?

Petitioner objected as there was nothing in the pleadings in the case in regard to custom or practice; incompetent to prove practice; any practice indulged in in opposition to the tariff is a violation of law and beyond the power of any railroad; practice must be uniform or we would have one rule in one county and another in another county; it seeks to change

the effect of a written instrument; the question might mean other railroads and is not confined to the defendant in this case and witness is not shown to be qualified to answer question as an expert.

Over the objection of Petitioner the witness answered:

> A. The practice of all carriers, so far as my knowledge goes, in Indiana and every other state, covered by that date and years before, was to place cars for the consignee to unload and bulky shipments which the consignee is required to unload, at an accessible point and to notify the consignee so that he can unload as required by law. (Pt. Rec., pp. 88-89.)

II

Points and Authorities.

1. Respondent was engaged in interstate commerce at time of his injury.

Illinois, &c., R. Co. vs. Porter, 207 Fed. 311.
Erie Co. vs. Shuart, 250 U. S. 465.
Michigan Central R. Co. vs. Owen, 256 U. S. 427.
Yazoo, &c., R. Co. vs. Nichols & Co., 256 U. S. 540.
Gulf, &c., R. Co. vs. Drennan, 204 S. W. 691.
Harris vs. C. N. O. & T. P. R. Co., 197 S. W. 464.
Hines vs. Wicks, 220 S. W. 581.

2. The handling of interstate shipments by a

carrier and the relations between such carrier and employes in connection with such a shipment are governed by the Federal law.

Pryor vs. Williams, 254 U. S. 43.
Seaboard, &c., R. Co. vs. Horton, 233 U. S. 492.
Atchison, &c., R. Co. vs. Harold, 241 U. S. 371.
New Orleans, &c., R. Co. vs. Harris, 247 U. S. 367.

3. The tariffs of a carrier filed with the Interstate Commerce Commission have the same force and effect as a statute.

Pennsylvania R. Co. vs. International &c., Co., 230 U. S. 184-197.
Boston, &c., R. Co. vs. Hooker, 233 U. S. 97.
Atchison, &c., R. Co. vs. Robinson, 233 U. S. 173.
Western, &c., Co. vs. Leslie & Co., 242 U. S. 448.
Louisville &c. R. Co. vs. Maxwell, 237 U. S. 94.

4. Tariffs of a carrier filed with the Interstate Commerce Commission cannot be changed or modified by the carrier and shipper.

G. F. & A. R. Co. vs. Blish Milling Co., 241 U. S. 190.
Baltimore, &c., R. Co. vs. Leach, 249 U. S. 217.
Baltimore, &c., R. Co. vs. New Albany, &c., Co., 48 Ind. App. 647.
Pennsylvania R. Co. vs. International, &c., Co., 230 U. S. 184.
Great Northern R. Co. vs. O'Connor, 232 U. S. 508.

III

Specifications of Error.

1. The Supreme Court of Indiana erred in refusing to hold that the shipment was interstate and that if the relationship of master and servant existed the liability of the Railroad Company was controlled by the Federal Employers' Liability Act, and not by the State law.

2. The Supreme Court of Indiana erred in failing to hold that the tariff placing on the respondent the duty of unloading the shipment had statutory effect and that the obligation of unloading rested upon the respondent and not upon the Railroad Company, and that the Railroad Company could not by any conduct on its part waive this provision of the tariff.

IV

Argument.

There is no dispute as to the facts in this case. The controversy arises solely as to the legal effect so that the questions are entirely those of law. The shipment came from Louisville, Ky., and was destined to Comiskey, Ind. There is no denial that up to the time of the unloading the shipment was an interstate shipment. The theory of the plaintiff, which was adopted by the State courts, was that after the shipment had arrived at Comiskey and the unloading process begun it lost its interstate iden-

tity and thereafter became a state shipment and passed from under the control of the Federal law to that of the State law.

In considering instruction No. 7, as requested by the Railroad Company, the Supreme Court held that in order to bring the respondent under the Federal Employers' Liability Act it was necessary that there be compensation for his service; otherwise, he could not be an employe. They further held that while under Rule 8-b it was the duty of the consignee to unload, nevertheless, there was a universal custom on the part of the carrier to disregard this rule and that when an interstate shipment within Rule 8-b was placed at a point where the consignee could unload, the interstate character thereupon ceased, and that any act by the carrier thereafter with reference to the unloading of the shipment, would not be a furtherance of, or an engaging in, interstate transportation within the meaning of the Federal law. The court concluded that the Railroad Company had placed itself in the dilemma of admitting that it was its duty to unload the cutter and that Rule 8-b did not apply, or that if Rule 8-b did apply the carrier itself had violated the rule. It refused to approve of any defense involving a violation by the carrier of its own rule.

We submit that these views of the State court are unsound, and contend that the shipment was interstate at the time of the accident and that Rule 8-b controlled notwithstanding any alleged violation of the rule on the part of the Railroad Company.

In Michigan Central R. Co. vs. Mark Owen, 256 U. S. 427, the shipment consisted of carloads of grapes placed upon a public delivery track accessible to the shipper. After several baskets had been taken out the question arose as to responsibility for losses occurring during the first forty-eight hours after the shipment had been placed for unloading. This court held:

> "The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

It will be noted that the shipper broke the seal on each of the cars involved, thereby accepting the shipment. This Court held that the shipment was still controlled by the bill of lading and that it was still under the control of the carrier and that its responsibility remained as such.

In Erie R. Co. vs. Shuart et al., 250 U. S. 465, the shipment involved was live stock. The court found the facts to be as follows:

> "Immediately after the car arrived at Suffern, petitioner placed it on a switch track, opposite a cattle chute and left it in charge of respondents for unloading. By letting down a bridge they at once connected the chute and car and were about to

> lead out four horses, when an engine pushed other cars against it and injured the animals therein."

The shipper failed to give notice within five days as contemplated by the bill of lading. The defense was that the bill of lading no longer controlled on the theory that the shipment had been delivered. In answer this court found that the obligation of the carrier had not yet ceased because the animals were simply awaiting removal through a chute owned, operated and controlled by the Railroad Company and that the shipper was still bound by the terms of the bill of lading.

We also call attention at this point to paragraph 3 of Section 1 of the Interstate Commerce Act, 41 Statutes at Large 474, which defines the term "transportation" to include, among other things:

> "All services in connection with the receipt, delivery, elevation and transfer, ventilation, refrigeration, or icing, storage, or handling of property transferred."

In other words, by statutory definition of the scope of the authority of the Interstate Commerce Commission delivery of an interstate shipment is a matter within the jurisdiction of the Interstate Commission, so that incidents in connection with such delivery are incidents of interstate transportation, and therefore subject to control by the Federal law.

We wish briefly to call attention at this point

also to a series of decisions by this court involving the question of whether shipments moving in interstate commerce lose their identity as interstate shipments after they have been put into storage upon arriving at the destination point. This court has held that the parties are bound, while such shipments are in storage, by the terms of the shipping contract, and that the liability is that under the Federal law. In one of these cases, to-wit: Southern Ry. Co. vs. Prescott, 240 U. S. 632, the shipper had gone so far as to remove upon arrival a part of the shipment, leaving the remainder with the Railroad Company in storage. The other two decisions that we have in mind are Cleveland, Cincinnati, Chicago & St. L. Ry. Co. vs. Dettlebach, 239 U. S. 588, and Western Transit Company vs. Leslie & Co., 242 U. S. 448.

There is another series of decisions by this court involving the validity of state statutes which attempted to control in various ways the delivery of interstate shipments. The theory of the states was that the interstate character of the shipment terminated upon its arrival at destination and that the circumstances and details respecting the delivery into the hands of the consignees were matters wholly within the jurisdiction of the State. This court, however, held that the interstate character of the shipments had not yet been divested and that they were still subject to the Federal law.

In St. Louis, Iron Mountain and Southern R. Co. vs. Edwards, 227 U. S. 265, the State sought to

impose penalties for delays in making deliveries of interstate shipments.

In Yazoo and Mississippi Valley R. Co. vs. Greenwood Grocery Co., 227 U. S. 1, the State Railroad Commission of Mississippi promulgated a regulation that freight had to be put in to an accessible place for unloading by the consignee within twenty-four hours after the arrival of the car at destination.

In Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Elevator Co., 226 U. S. 426, the State of Minnesota attempted to enforce a law to furnish cars within limited periods after demand had been made.

In McNeill vs. Southern Railway Co., 202 U. S. 543, the State of North Carolina, through its corporation commission, attempted to enforce an order involving demurrage on cars of coal that had originated in interstate commerce.

In each of these cases this court held that the incident of the delivery of the interstate shipments was controlled by the Federal law and that the states, following statutory action by Congress, no longer had jurisdiction.

In the case now before you the shipment was being taken out of the car. There had not yet been a delivery to or acceptance of the same by the consignee. The car in which it arrived was a part of a local freight train moving from Louisville, Ky., that would continue on its journey through Indiana

as soon as the freight destined for Comiskey was unloaded. For all that appears the shipment might have remained on the premises of the Railroad Company for an indefinite period before its removal. As in the Mark Owen case, some damage or loss may have occured to the shipment during the forty-eight hour period after its arrival at destination after it had been taken from the car and was still on the Railroad Company premises. As we construe the decision of this court in the Mark Owen case, the liability of the carrier for such damage or loss during said forty-eight hour period would have been that of the carrier, and such liability would have continued until the consignees removed the shipment from the Railroad Company premises. In Erie R. Co. vs. Shuart, supra, involving a shipment of live stock, the car had been turned over to the consignees. The damage occurred while they were getting the chute ready preparatory to unloading the animals. Certainly in that case there was a greater control over the shipment by the consignees than in the present case. Again, in the cases involving statutes attempting to regulate the incident of delivery as, for example, McNeill vs. Southern Railway Co., supra, the cars had been placed at specified points ready for unloading by the consignees. Demurrage, of course, is collected by the carrier under interstate tariffs on interstate shipments because of the delay on the part of the shipper in unloading the shipment. In other words, where there is any delay on the part of the shipper in removing a shipment

from the Railroad Company premises, or in unloading the same, the charges, where the shipment was an interstate shipment, are due under tariffs filed with the Interstate Commission, and the collection of such charges could be made in the Federal courts under the Federal law. As to charges generally, this, we submit, has been clearly decided in Louisville & Nashville R. Co. vs. Rice, 247 U. S. 201, and as to charges involving demurrage, in Berwind-White Co. vs. Chicago & Erie R. R., 235 U. S. 371.

Moreover, suppose that one of the crew of the local freight train had become injured while unloading this piece of machinery. Would the liability of the carrier toward him be controlled by the state or by the interstate law? It seems to us clear that the case of such employe would be controlled by the Federal law and that this would be true even though such employe would be acting beyond the scope of his duty in the sense that he was unloading the shipment whereas it should have been unloaded by the consignee. However that may be, the fact remains that the crew of this train was engaged in unloading a shipment which originated in the State of Kentucky and which was being delivered at a point within the State of Indiana, an activity which was interstate in its nature, and which was interstate at the time of the accident and would remain so until the owners removed the shipment from the Railroad Company premises. It hardly needs citation of authority to prove that a railroad employe engaged in unloading or loading a shipment moving in inter-

state commerce is at the time engaged in interstate commerce and that liability of the carrier to such employe is controled by the Federal law. Illinois Central R. Co. vs. Porter, 207 Federal Reporter 311.

The shipment being interstate, as we submit we have demonstrated it to be, it follows that the Supreme Court of Indiana erred in failing to hold that the provisions of Rule 8-b were binding upon the plaintiff and could not be waived by any conduct on the part of the carrier. That a tariff provision has statutory effect was established in Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 134. A provision of the tariff thus on file with the Commission becomes a part of the shipping contract and is binding upon the parties who are interested even though they have no actual knowledge of the tariff. Of the many decisions of this court we think it sufficient to call attention only to Boston & Maine R. R. vs. Hooker, 233 U. S. 97, and Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Company, 241 U. S. 190.

The obvious purpose of publishing a tariff with the Interstate Commerce Commission is to prevent discrimination by the Railroad as between its patrons. If the Railroad by contract, express or implied, obviates or modifies a tariff of any kind in any respect, it, of course, lets itself open to a charge of discrimination, but by so doing it does not relieve the shipper from his duty to comply with the tariff regulation. This, we submit, was decided by this court some years ago in Armour Packing Co. vs.

United States, 209 U. S. 56, this court holding that by the filing of a tariff fixing a charge for certain transportation, the shipper could not thereafter insist upon a rate which had been provided for in a contract made prior to the publication of the tariff. If a shipper could protect himself by an agreement or by declaring that certain conduct of the carrier amounted to a waiver or created an estoppel, the purpose of publishing a tariff would be defeated. Certainly, no such easy method of evasion was contemplated when Congress passed the Interstate Commerce Act. This court, in A. J. Phillips Company vs. Grand Trunk Western Ry. Co., 236 U. S. 662, held that the prohibitions of the Interstate Commerce Act against unjust discrimination related to preferences that might be given by means of consent judgments or waivers of defenses. So, too, in this case we think that the prohibitions of the Interstate Commerce Act extends likewise to the conduct of the Railroad Company in this case in assisting to unload the shipment. It seems to us to follow that if the Railroad Company waived the tariff provision by assisting as it did in this case, it could, by refusing to assist another customer, discriminate. Nor does it seem to us to follow that even if a custom was proved of the Railroad Company assisting in the unloading of all less than carload shipments, the tariff can be waived or annulled by the Railroad Company. The Interstate Commerce Commission is authorized by statute to prescribe rules and regulations for the filing and canceling of tariffs. Unless

the tariff is filed or is canceled as the rule of the Commission prescribes, it cannot become effective or be made void by agreement between the Railroad Company and the shipper, or by conduct on the part of either, or both. If Rule 8-b was in force and effect, as we contend it was, then the duty of unloading rested upon the owner with the result, of course, that there would be no liability upon the Railroad Company because the owner selected the appliances and was in control of the entire situation. If there was any negligence involved it was his, and not that of the Railroad Company.

On the other hand, if the Supreme Court of the State was correct in its position that the relation of master and servant existed then the liability of the Railroad Company must be in accordance with the provisions of the Federal Employers' Liability Act as construed by this court. That the statute in question applies to proper cases arising out of interstate commerce admits of no argument. This court recently decided the point again in Pryor, et al. vs. Williams, 254 U. S. 43. See also New York Central & Hudson River R. Co. vs. Tonsellito, 244 U. S. 360; New York Central R. R. Co. v. Winfield, 244 U. S. 147, and Erie R. R. Co. vs. Winfield, 244 U. S. 170. The State court overruled the Railroad Company's demurrer to the first paragraph of the complaint, holding that the plaintiff was an employe. The Supreme Court of the State found that there was no error in the instructions given by the trial court based upon the Employers' Liability Act of the State

of Indiana.* The trial court's instructions to the jury under the State Liability Act read as follows:

> "No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at that time defendant was engaged in operating a railroad in this State and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was so injured while employed under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said conductor and caused by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries and your verdict should be for the plaintiff."
>
> "No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of this complaint, and that at that time defendant had in its employ and engaged in conducting its said business in this State more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exercise of ordinary

* The statute is carried in full as an appendix to this Brief.

> care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance."

We submit that it is clear from the foregoing that the State courts did not accord to the Railroad Company its full rights under the Federal law when it failed to find that the shipment was interstate at the time of the accident. This, we think, resolves the case into alternatives. If we assume, on the one hand, that the relationship of master and servant existed, then the State court erred in not applying the Federal Employers' Liability Act as construed by this court. On the other hand, if it be assumed that the relationship of master and servant did not exist, then we submit that the State court erred in failing to hold that the provisions of the tariff Rule 8-b conclusively applied; and, of course, if Rule 8-b applied, the responsibility for the unloading rested upon the plaintiff and not upon the Railroad Company. There was fundamental error in the court below in failing to hold that the shipment at the time of the accident was interstate, and that the controversy was controlled by the Federal law. We submit that this would be so, whether the relationship of master and servant existed—in which event the Federal Employers' Liability Act would govern—or whether the relationship of master and servant did not exist—in which event Rule 8-b would control, and the responsibility for the unloading would be cast upon the plaintiff.

It is therefore respectfully submitted that the

decision of the Supreme Court of the State of Indiana in this case is erroneous and that this judgment should be reversed.

MORISON R. WAITE,
HARRY R. MCMULLEN,
CASSIUS W. MCMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioners.

APPENDIX.

Laborers---Injuries---Employers' Liability--Damages.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That any person, firm or corporation while engaged in business, trade or commerce within this state, and employing in such business, trade or commerce five or more person shall be liable and respond in damages to any person suffering injury while in the employ of such person, firm or corporation, or in case of the death of such employe, then to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then to such employe's parents; and if none, then to the next of kin dependent upon such employe, where such injury or death resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers, or by reason of any defect, mis-

management or insufficiency, due to his, its or their carelessness, negligence, fault or omission of duty.

Prosecution—Burden of Proof—Negligence.

SEC. 2. In any action prosecuted under the provisions of this act, the burden of proving that such injured or killed employe did not use due care and diligence at the time of such injury or death, shall be upon the defendant, but same may be proved under the general denial. No such employe who may have been injured or killed shall be held to have been guilty of negligence or contributory negligence by reason of the assumption of the risk thereof in any case where the violation by the employer or his, its or their agents or employes, of any ordinance or statute enacted, or of any rule regulation or direction made by any public officer, bureau or commission, was the cause of the injury or death of each employe. In actions brought against any employer under the provisions of this act for injury or death of any employe, it shall not be a defense that the dangers or hazards inherent or apparent in the employment in which such injured employe was engaged, contributed to such injury. No such injured employe shall be held to have been guilty of negligence or contributory negligence where the injury complained of resulted from such employe's obedience or conformity to

any order or direction of the employer or of any employe to whose orders or directions he was under obligation to conform or obey, although such order or direction was a deviation from other rules, orders or directions previously made by such employer.

Risks of Employment.

SEC. 3. That in any action brought against any employer under or by virtue of this act to recover damages for injuries or the death of, any of his, its or their employes, such employe shall not be held to have assumed the risks of the employment in any case where the violation of such employer or his, its or their agents or employes of any ordinance or statute enacted, or of any rule, direction or regulation made by any public officer or commission, contributed to the injury or death of such employe; nor shall such injured employe, be held to have assumed the risk of the employment where the injury complained of resulted from his obedience to any order or direction of the employer or of any employe to whose orders or directions he was under obligations to conform or obey although such order or direction was a deviation from other orders or directions or rules previously made by such employer. In any action brought against any employer under the provisions of this act to recover damages for injuries to or the death of, any of his, its or their employes, such employe shall not be held to have

assumed the risk of any defect in the place of work furnished to such employe, or in the tool, implement or appliance furnished him by such employer where such defect was, prior to such injury, known to such employer or by the exercise of ordinary care might have been known to him in time to have repaired the same or to have discontinued the use of such defective working place, tool, implement or appliance. The burden of proving that such employer did not know of such defect, or that he was not chargeable with knowledge thereof in time to have repaired the same or to have discontinued the use of such working place, tool, implement or appliance, shall be on the defendant, but the same may be proved under the general denial.

Judgment—Surviving Right of Action.

SEC. 4. The damages recoverable under this act shall be commensurate with the injuries sustained, and in case death results from such injury, the action shall survive: *Provided,* That where any such injured person recovers a judgment under the provisions of this act and an appeal is taken from such judgment, and pending such appeal, the injured person dies and said judgment be thereafter reversed; or where such injured person dies after said judgment is reversed and before trial, the right of action of such person shall survive to his or her personal representative, and such action may be continued in the name of such personal representative, for the benefit of the person entitled under this act to receive the same.

Exempting Contract Void—Set-Off.

SEC. 5. That any contract, rule, regulation, by-law, or device whatsoever, the purpose, intent, or effect of which would be to enable any employer to exempt himself or itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such employer under or by virtue of any of the provisions of this act, such employer may set off therein by special plea any sum such employer has contributed or paid to any insurance, relief benefit, or indemnity for and on behalf of such injured employe that may have been paid to him or to the person entitled thereto on account of the injury or death for which said action is brought, but in no event shall the amount of such set-off exceed the amount paid to such employe or other person entitled thereto out of such insurance, relief benefit or indemnity fund.

Maximum Death Liability.

SEC. 6. That where any action is brought on account of the death of any person under this act, the liability of any such employer shall not exceed $10,000, and the provisions of the law now in force as to parties plaintiff shall apply.

Questions of Fact in Trial.

SEC. 7. All questions of assumption of risk, negligence or contributory negligence shall be ques-

tions of fact for the jury to decide, unless the cause is being tried without a jury in which case, such questions shall be questions of fact for the court.

Limitation of Action.

SEC. 8. That no action shall be maintained under this act unless the same is commenced within two years from the date the cause of action accured.

Receivers Included.

SEC. 9. That the terms "employer," "persons," "firm," and "corporation" shall include receivers or other persons charged with the duty of managing, conducting or operating business, trade or commerce.

Not Retroactive—Pending Litigation.

SEC. 10. This act shall not apply to injuries received by any employe before the passage of the same nor affect any suit or legal proceedings pending in any court at the time of its passage.

Act Supplemental.

SEC. 11. This act shall be construed as supplemental to all laws and parts of laws now in force concerning employers and employes, and shall repeal only such laws and parts of laws as are in direct conflict with the provisions of this act. That nothing in this act shall be held to limit the duty

or liability of employers or to impair the rights of their employes under the common law or any other existing statute or to affect the prosecution of any pending proceeding or right of action now existing.

Emergency.

SEC. 12. Whereas, an emergency exists for the immediate taking effect of this act, this act shall be in force from and after its passage.